No. 91-1526

In The

Supreme Court of the United States

October Term, 1992

FERRIS J. ALEXANDER, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF PETITIONER

JOHN H. WESTON*
G. RANDALL GARROU
CATHY E. CROSSON
CLYDE F. DEWITT
WESTON, SARNO, GARROU
& DEWITT
433 N. Camden Drive,
Suite 900
Beverly Hills, California 90210
(310) 550-7460

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1) Does RICO forfeiture constitute a prior restraint of the kind condemned in *Near v. Minnesota*, or otherwise violate the First Amendment, when applied to close a $25 million chain of bookstores, video stores, and theaters to confiscate all their property including four years' proceeds, and to destroy their inventories, solely on the basis of seven obscene videotapes and magazines?

2) Does the forfeiture of a $25 million media business, along with a six-year prison term and fines in excess of $200,000, all as punishment for seven obscene videotapes and magazines, violate the Eighth Amendment?

LIST OF PARTIES

Petitioner FERRIS J. ALEXANDER, SR. and Respondent UNITED STATES OF AMERICA are the only interested parties remaining in this action. Petitioner previously notified this Court of his belief that his co-defendants in the criminal trial below (Delores Alexander, Jeffrey Alexander, and Wanda Magnuson), did not pursue this matter on appeal and no longer have an interest in the outcome of this proceeding. Similarly, a civil case entitled *Alexander v. Thornburgh*, was consolidated with this case in the Court of Appeals. However, the petition for certiorari did not seek review of the civil case and it is petitioner's understanding that no parties thereto seek this Court's review of that case.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Alexander v. Thornburgh*, 943 F.2d 825 (8th Cir. 1991), and is reproduced at page 1 of the Appendix to the Petition for Writ of Certiorari (hereinafter "C.A."). The Court of Appeals' unreported order denying rehearing and rehearing *en banc* is set forth at C.A. 163. The District Court's reported opinion deciding the forfeiture issue, *United States v. Alexander*, 736 F.Supp. 968 (D. Minn. 1990), is reproduced at C.A. 163; its unpublished Judgment Including Sentence Under The Sentencing Reform Act is reproduced at C.A. 125. The District Court's forfeiture order of August 6, 1990 is reproduced at C.A. 134 and its final orders of forfeiture appear in the record as docket entry nos. 273 and 282-291.

JURISDICTION

This Court granted a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit affirming Petitioner's conviction and sentence of forfeiture. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Eighth Amendments to the United States Constitution are reproduced at C.A. 164. The forfeiture provisions of the federal RICO statute (18 U.S.C. § 1963) are reproduced in their entirety in the Appendix at the end of this brief.

STATEMENT OF THE CASE

This case starkly presents the issue whether the government may, consistent with the First and Eighth Amendments, invoke the forfeiture provisions of the RICO Act, 18 U.S.C. § 1963, to confiscate entire media businesses in retaliation for obscenity offenses. Solely because seven items (four magazines and three videotapes) were found obscene at trial, the government used these provisions to dismantle and destroy Petitioner's chain of bookstores and video stores. Even before this Court acted on the certiorari petition, the government sold most of the real property which housed these media businesses, and burned their inventories of books and films.

Petitioner Ferris Alexander formerly owned and operated numerous bookstores, video stores and theaters in Minnesota, primarily in the Minneapolis/St. Paul area. He also distributed books, magazines, and videotapes wholesale. These businesses were largely devoted to selling or renting erotic materials, presumptively protected by the First Amendment and which Petitioner believed to be within local community standards.[1]

[1] Petitioner's businesses were notably successful: the government alleged that their annual revenues were in the millions of dollars. In addition to the local popularity of the erotic materials his businesses offered for sale and rental, official acquiescence reinforced Petitioner's belief that the materials he disseminated were within the bounds of community standards. He had not been prosecuted since he was acquitted of obscenity charges in the mid-1970's, and local officials had subsequently announced that they would not prosecute for obscenity unless the materials involved bestiality or children. Nor, prior to the alleged conduct in this case, had there been any federal obscenity prosecutions in the district since his earlier acquittal.

In 1989, however, the government charged Petitioner with multiple obscenity and RICO/obscenity violations. The indictment (R.1)[2] charged 34 obscenity counts based on the alleged obscenity of six magazines and seven videotapes, and three RICO counts predicated exclusively on those obscenity charges.[3]

Petitioner challenged obscenity-predicated RICO forfeitures in his pre-trial motions, and Magistrate Janice Symchych initially held the forfeiture provisions of 18 U.S.C. § 1963 facially unconstitutional for overbreadth, on grounds that they authorize the wholesale forfeiture of expressive businesses without regard for the censorial consequences thus visited upon protected speech. *United States v. Alexander*, 736 F.Supp. at 986-987. (C.A. 72-74.) Citing the numerous federal decisions striking down padlocking orders and license revocations as overly broad penalties for obscenity convictions, the magistrate also concluded that RICO forfeitures operate as an impermissible prior restraint. 736 F.Supp. at 989-991. (C.A. 78-81.) She therefore recommended that the trial court hold RICO forfeiture facially unconstitutional as a prior restraint. *Id.* at 981, 988, 990. (C.A. 58, 81, 119.)

The district court, however, held that the RICO forfeiture remedy was neither overbroad nor a prior restraint, on

[2] "R." refers hereinafter to district court docket entries.

[3] The indictment also alleged tax offenses, and Petitioner was convicted of four tax violations. Those convictions are immaterial to the issues before this Court, as they were completely unrelated to the RICO counts and the resulting forfeiture.

grounds that the First Amendment imposes no limitation on the penalties the government may exact for obscenity offenses. 736 F.Supp. at 978-980. (C.A. 51-55.) The trial court deemed the First Amendment irrelevant, because "the law . . . treats an obscenity charge the same as any other criminal charge, be it bank robbery, narcotics trafficking, or firearms violations." *Id.* at 980. (C.A. 55.)

The court also discerned in the impending wholesale forfeiture of Petitioner's bookstores, theaters, and video stores "no necessary impact on expressive activity in the future." *Id.* (C.A. 54.) In fact, these forfeitures ultimately closed virtually every adult erotica outlet in the Twin Cities area.

Following a jury trial, Petitioner was acquitted on 16 obscenity counts and convicted on 18 counts, based on the determination that seven of the thirteen charged items – slightly more than half – were obscene. Based exclusively upon these seven obscene items Petitioner was also convicted of the three RICO/obscenity counts. (C.A. 125.)

For these offenses, the ailing 73-year-old Petitioner was sentenced to concurrent terms requiring his incarceration for six years. The trial court also assessed him well over $200,000 in fines and costs. (C.A. 127-128, 132, 133, 162.) In ordering Petitioner to pay the costs of prosecution, the court dismissed the fact that it was dismantling an entire chain of communicative businesses with: "Defendant created his criminal empire and now must pay for its destruction." (C.A. 162.)

In addition to these harsh criminal penalties, however, 18 U.S.C. § 1963(a) *required* the trial court to order a total forfeiture,[4] extending to Petitioner's entire chain of retail

[4] Title 18 U.S.C. § 1963(a)(1)-(2) compel the trial court to order forfeiture of any interest a convicted RICO defendant has acquired or maintained in violation of § 1962, and any interest in, security of, claim against, or property affording a source of influence over any enterprise which has been conducted in violation of § 1962. Together, these sections require the blanket forfeiture of the enterprise and were so applied in this case to completely extirpate Petitioner's speech businesses.

The language of § 1963(a)(3) appears to require forfeiture only of property constituting or derived from proceeds obtained from "racketeering activity," and if properly construed as limited to the actual proceeds from the sale of the seven obscene items, Petitioner would not challenge the constitutionality of this provision. However, the trial court applied this provision to forfeit a wide range of assets, particularly the $8.9 million alleged as proceeds from the overall conduct of the enterprise for four years. *See* C.A. at 144-145. As the courts below construed this provision, it too is challenged as unconstitutional.

bookstores and video stores, along with his wholesale media distribution business which warehoused an extensive inventory. The forfeiture order of August 6, 1990, basically encompassed all of the assets associated with Petitioner's ten operating wholesale and retail media businesses, including the real estate that had housed them, their bank accounts, and all the personal property necessary to conduct these businesses. Included in the latter category were film projectors, television monitors, video cassette players, cash registers, shelves, all office equipment, and three company vehicles (two vans and a trailer) used to transport media materials. Most dramatically in terms of its direct and immediate impact upon expression, the forfeiture order authorized the government to confiscate these bookstores' and video stores' existing inventories of untold thousands of books, magazines, and videotapes. (C.A. 134.)[5]

The court also ordered forfeiture of over $8.9 million in cash assets, under the government's theory that this amount constituted proceeds obtained from "racketeering activity"

[5] Technically, the forfeiture order of August 6, 1990 simply ordered the forfeiture of *petitioner's interest* in all of the assets described above (as well as some other properties not mentioned here). Final orders of forfeiture were subsequently entered as against the entire world (R.273 and 282-291). These final orders of forfeiture included all the items specifically described above.

from 1985 through 1988, even though all but seven of the hundreds of thousands of items sold over that period were presumptively protected materials.

The Eighth Circuit Court of Appeals affirmed Petitioner's conviction, rejecting his arguments that RICO forfeiture of an entire expressive business for obscenity offenses violated the First and Eighth Amendments. (C.A. 21-25.) Relying entirely upon the Fourth Circuit's decision in *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1989), the court concluded First Amendment analysis was simply irrelevant. *Alexander v. Thornburgh*, 943 F.2d 825, 834-835. (C.A. 21, 23.) The court apparently also adopted the Fourth Circuit's conclusion in *Pryba* that it need not review this sentence under the Eighth Amendment. *Id.* at 835-836. (C.A. 25.)

After the Eighth Circuit affirmed Petitioner's conviction, but before that court had even denied rehearing, the government destroyed all of the presumptively-protected inventories of books, films, and magazines it had seized from Petitioner's warehouse and nine retail outlets.[6] Federal marshals in Minneapolis trucked three tons of magazines, videotapes, and other inventory to a garbage processing plant, where the magazines were burned and the videotapes destroyed by crushing.[7]

Additionally, despite the pending petition before this Court, the government sold most of Petitioner's real property as quickly as it could dispose of those properties by quitclaim deed. To date the government has sold nine of the ten parcels of real property; it has also sold virtually all of the businesses' equipment necessary for the future dissemination of

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[6] The RICO statute expressly prohibits *the defendant*, as opposed to third parties, from even *applying* for any type of stay order to preserve the forfeited assets pending the conclusion of any appeal. *See* 18 U.S.C. § 1963(f).

[7] *See Minneapolis Star Tribune*, October 19, 1991 at 1B.

constitutionally-protected materials. Most recently, the government sold to the City of Minneapolis a parcel of Petitioner's real property appraised at $145,000, for the price of $1.[8]

The RICO Act does not require the government to provide an itemized inventory of the confiscated property. Accordingly, the government has never filed any document in this case itemizing the forfeited property or estimating its value. Because the government also seized Petitioner's business records, it is impossible to estimate accurately the total value of the property the government has sold or destroyed. However, Petitioner estimates the value of his forfeited businesses at $25,000,000.[9]

SUMMARY OF ARGUMENT

When predicated solely on prior speech violations, the forfeiture provisions of the federal RICO statute represent a unique and dangerous threat to the security of First Amendment freedoms, not only for the erotic entertainment industry, but for all communications businesses. In this case, pursuant to the mandatory forfeiture provisions of 18 U.S.C. § 1963, the government seized and destroyed all of the countless thousands of magazines, books and video tapes from petitioner's wholesale warehouse and nine separate bookstores and video stores solely because seven of thirteen charged items were found obscene at trial. None of the other thousands of destroyed media items were even *alleged* to be obscene. In addition to the mass destruction of these untold thousands of media materials, the government has also confiscated and sold almost all the real and personal property necessary for the business prospectively to disseminate constitutionally protected expression.

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[8] This transaction involved property at 341 E. Lake St. in Minneapolis and closed on July 29, 1992, one month after certiorari had been granted.

[9] This is the estimated combined value of the hard assets of the businesses and the businesses' value as going concerns.

The Court of Appeals upheld this mass destruction of a media business upon the erroneous theory that the First Amendment imposes no limitation upon the scope of punishment which government may exact once it has obtained two or more obscenity convictions. Yet, in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), this Court, while upholding a closure of a bookstore for prostitution and lewd conduct, nonetheless emphasized that had the triggering violations involved expression (such as, *e.g.*, obscenity), First Amendment scrutiny would be required. Similarly, in *Fort Wayne Books v. Indiana*, 489 U.S. 46, 67 (1989), this Court made clear that "the state cannot escape the constitutional safeguards of our prior cases by merely recategorizing a pattern of obscenity violations as 'racketeering.' " The Court invalidated RICO seizures, concluding that "[i]t is incontestable that these proceedings were begun to put an end to the sale of obscenity . . . , and hence we are quite sure that the special rules applicable to removing First Amendment materials from circulation are relevant here . . . . " *Id.* at 66. In light of these clear statements by this Court, the Court of Appeals' conclusion that First Amendment considerations are irrelevant here is plainly unsupportable.

In fact, the government's mass destruction of expressive businesses in this case was "the essence of censorship," *i.e.*, a prior restraint, just as in *Near v. Minnesota*, 283 U.S. 697, 713 (1931), where the invalid statute authorized the courts to suppress "the dissemination of future issues of a publication because its past issues had been found offensive." Unlike a typical criminal punishment, the draconian sanction challenged herein directly suppressed expressive materials and the means to disseminate them. Rather than simply jailing or fining the Petitioner (which occurred in any event), the forfeiture provisions focused on suppression of his media business.

The fundamental error committed by the Court of Appeals was to accept the government's assertion that, under *Near*, forfeiture cannot be a prior restraint because it was imposed as "subsequent punishment" in a criminal case. However, *Near* suggested nothing of the sort. *Near* stated: "*We have no occasion to inquire as to the permissible scope of subsequent punishment*" (283 U.S. at 715, emphasis added), clearly implying that there was some tangible First Amendment limit as to how far subsequent punishment may go. Obviously the same First Amendment principles this Court protected in *Near* would be violated if the very same sanction stricken in *Near* were authorized by a *criminal* statute. Accordingly, the criminal-civil distinction is unquestionably an inappropriate formalistic test and the Court of Appeals clearly erred in adopting it.

Rather, this Court's prior restraint cases suggest that the only appropriate test for distinguishing a prior restraint from a permissible punishment is that a sanction is an unconstitutional prior restraint if *it is imposed for a prior speech violation* and *in every case where the statutory sanction is imposed, it will immediately or inevitably suppress speech.* Because of this critical distinction, RICO forfeiture operates as an unconstitutional prior restraint rather than a permissible criminal punishment.

Recognition of this distinction is critical if basic First Amendment protections – both for individuals and communications businesses – are to survive. For example, if the challenged forfeiture were upheld, there would be no barrier to expansion of the types of speech which could trigger forfeiture, to include "national security violations," "disseminating unauthorized or classified information", or defamation. Surely the First Amendment would not permit forfeiture of a newspaper or broadcast network which committed such a violation.

To sustain RICO forfeiture is to eviscerate the most bedrock First Amendment principle: that government may not preclude future, presumptively protected speech in retaliation for prior unprotected speech. In essence, this case represents a fundamental crossroads for liberty of the press in this country. If the forfeiture of a media business for prior speech violations is not unequivocally rejected as an unconstitutional prior restraint, laws empowering government to forfeit speech businesses for prior speech violations will surely proliferate. The First Amendment, as we know it, will simply cease to exist.

Alternatively, massive forfeitures as a remedy for unprotected speech are also overbroad because they inevitably operate to censor protected speech. In contrast to the typical overbreadth case where a law's prohibition includes protected speech, here the proscribed conduct is *all* unprotected but the *sanction* imposed for the violation is impermissibly overbroad, in violation of First Amendment rights. *See, e.g., NAACP v. Alabama*, 377 U.S. 288, 307-308 (1964).

Finally, although Petitioner's First Amendment claims should dispose of this case, the forfeitures imposed here violate the Eighth Amendment guarantees against "excessive fines" and "cruel and unusual punishment." The forfeiture of Petitioner's $25-million business, in addition to a six-year prison term and some $200,000 in fines, is grossly disproportionate to the offense of distributing seven items found to be obscene. Moreover, such forfeitures inherently violate the Eighth Amendment because they revive the hated and much-abused "forfeiture of estate" which the framers clearly sought to abolish.

ARGUMENT

I. THE FORFEITURE AND CLOSURE OF AN ENTIRE MEDIA BUSINESS, ALONG WITH THE DESTRUCTION OF ITS INVENTORY, SOLELY FOR THE SALE OF SEVEN OBSCENE ITEMS, VIOLATES THE FIRST AMENDMENT BOTH AS AN UNCONSTITUTIONAL PRIOR RESTRAINT AND BY ITS OVERBREADTH.

By deploying RICO forfeiture to destroy a media business of which it disapproves, the government presents this Court with an unprecedented assault on First Amendment liberties. The government has targeted a communicative business for destruction, and solely on the basis of seven items determined at trial to be obscene, has invoked the ultimate censorial weapon: RICO's blanket forfeiture. By means of this forfeiture, the government has closed down an entire chain of bookstores, theaters, and video-stores engaged in

erotic speech, to which the government is openly hostile. It has removed from circulation and burned or otherwise destroyed those businesses' vast inventories of books, magazines, and videotapes. It also forfeited and sold all the neutral real and personal property necessary for those businesses to engage in all future expressive activity.

The decision below, denying the relevance of the First Amendment in order to sustain this forfeiture, defies the bedrock prohibition against prior restraint this Court announced in *Near v. Minnesota*, 283 U.S. 697 (1931), and opens the door wide to governmental suppression of officially-disfavored speech. If this Court were to affirm, and to condone this forfeiture and book-burning, it would signal a seismic shift in First Amendment doctrine. For the first time, it would unleash government to employ whatever remedies it chooses to punish unprotected speech, no matter that the effect is to directly and indiscriminately preclude future, protected speech.

Petitioner's challenge invokes the traditional First Amendment axiom that government may not directly and indiscriminately ban future speech because of prior unprotected expression. Accordingly, forfeiture of a media business purchased by a drug cartel would be constitutionally permissible,[10] whereas the forfeiture of petitioner's property must be invalidated.[11]

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[10] The government has sought to obfuscate the scope of the legal issue regarding RICO/obscenity forfeiture, disingenuously contending that "if bookstores, newsstands, publishing houses, and the like were immune from forfeiture, drug lords and other criminals would waste no time in investing in those businesses, and insulating their criminal proceeds from seizure." (Cert. Opp. Br. at 6.) However, Petitioner challenges the constitutionality of RICO forfeiture *only* where predicated *exclusively* on obscenity violations. RICO forfeitures for drug crimes and other non-speech offenses would be unaffected by this Court's determination that, *as applied to obscenity*, RICO forfeiture is invalid. If drug money were invested in a video store, forfeiture would no more violate the First Amendment than did the padlocking order in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986).

[11] Petitioner agrees that proceeds from the sale of materials adjudicated obscene would be forfeitable without offense to the First Amendment.

Any departure from this rule would fundamentally jeopardize expressive First Amendment rights throughout the country. For example, the obscenity conviction reversed in *Jenkins v. Georgia*, 418 U.S. 153 (1974),[12] would today be a RICO predicate offense permitting the government to confiscate the entire theater chain which exhibited the film, and even the Hollywood studio which produced it. If the government moved as aggressively as it has against Petitioner in this case, it would have already dismantled the Georgia theater and the Hollywood movie studio, burning their film libraries and quitclaiming the real property before this Court would ever have had a chance to rectify the error.

Similarly, both the present administration and local prosecutors have frequently threatened even mildly erotic materials such as *Penthouse* or *Playboy* magazine.[13] Accordingly, should this Court uphold the forfeiture herein, emboldened prosecutors may well file RICO-obscenity charges against mainstream national bookstore or convenience store chains where one of their outlets ignored local prosecutorial threats and sold two issues of *Playboy*, *Penthouse* or *Cosmopolitan*, in a particularly prudish community. Based upon an obscenity verdict, the trial court would then be required to forfeit the

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[12] In that case, the major studio film "Carnal Knowledge," starring Jack Nicholson, Candice Bergen and Ann Margaret, was found obscene by a Georgia jury, and the theater owner's conviction was affirmed by the Georgia Supreme Court. This Court reversed the conviction.

[13] *See, e.g., Playboy Enterprises, Inc. v. Meese*, 639 F.Supp. 581 (D.D.C. 1986); *Council For Periodical Distributors Association v. Evans*, 642 F.Supp. 552 (M.D.Ala. 1986), *aff'd.* 827 F.2d 1483 (11th Cir. 1987); *Freedberg v. U.S. Dept. of Justice*, 703 F.Supp. 107 (D.D.C. 1988); *PHE, Inc. v. U.S. Dept. of Justice*, 743 F.Supp. 15 (D.D.C. 1990); and *U.S. v. PHE, Inc.*, 965 F.2d 848 (10th Cir. 1992).

entire enterprise, *e.g.*, the entire local bookstore or convenience store, or even the national chain of stores.

Nor would the destruction of broad First Amendment rights be limited to erotic expression. If this Court were to adopt the government's incredibly dangerous argument, nothing would prevent government from passing new legislation effectuating a stranglehold on the press and other media. Predicates such as "jeopardizing national security," "disseminating unauthorized information" or defamation could all be added to RICO or become triggering events under separate statutes with forfeiture type remedies. Using such forfeiture laws, the government could then simply forfeit the entire assets of the offending newspaper company or broadcasting business.

Indeed, if outright forfeiture of media businesses for any violation of the criminal laws were found constitutionally unobjectionable, there would be no end to the list of predicate crimes that could be legislatively employed as triggering offenses. The point is simply that First Amendment standards of scrutiny *must* be employed where government seeks to utterly destroy a media business solely because of one or more prior speech violations.

A. The Court Of Appeals Erred In Refusing To Analyze These Sanctions Under The Heightened Levels Of Scrutiny Applicable In First Amendment Cases.

The Court of Appeals was able to sustain the forfeiture herein *only* by concluding that First Amendment concerns become irrelevant once the government has obtained an obscenity conviction. Following *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1990), the Eighth Circuit panel unfortunately held that this egregious form of censorship does not implicate the First Amendment because " '[o]bscenity is not protected . . . and a convicted racketeer may not launder his

dirty money by investing it in materials that involve protected speech.' " *Alexander v. Thornburgh*, 943 F.2d 825, 834-835.[14]

In sharp contrast to the approach taken by the Court of Appeals, this Court has consistently repudiated attempts to finesse the First Amendment by resort to "mere labels" (*e.g.*, "racketeering activity"), holding that they cannot confer "talismanic immunity from constitutional limitations." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). In *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 67 (1989), the Court reaffirmed this principle in a pre-trial seizure context, clearly mandating the application of First Amendment analysis in a RICO obscenity case: "[T]he state cannot escape the constitutional safeguards of our prior cases by merely recategorizing a pattern of obscenity violations as 'racketeering.' " The Court further noted:

> "It is incontestable that these proceedings were begun to put an end to the sale of obscenity . . . , and hence we are quite sure that the special rules applicable to removing First Amendment materials from circulation are relevant here . . . .
>
> "The fact that the [state's] motion for seizure was couched as one under the Indiana RICO law – instead of being brought under the substantive obscenity laws – is unavailing. As far back as the decision in *Near v. Minnesota ex rel. Olson*, . . . this Court has recognized that the way in which a restraint on speech is 'characterized' . . . is of little consequence. . . . For example, in *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), we struck down a prior restraint placed on the exhibitions of films under a Texas 'public nuisance' statute, finding that its failure to comply with our prior case law in this area was a fatal defect." *Id.* at 66. (Citations omitted.)

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[14] Of course, as noted above, Petitioner neither seeks the right to "launder . . . dirty money," nor disputes that proceeds from the sale of specific materials determined to be obscene would be forfeitable.

Fort Wayne Books thus reaffirmed an essential principle of *Near v. Minnesota*: that the Court will "cut through mere details of procedure" to analyze realistically "the operation and effect of the statute in substance." 283 U.S. at 713. *See also Kingsley Books v. Brown*, 354 U.S. 436, 441 (1957) ("The judicial angle of vision in testing the validity of a statute . . . is 'the operation and effect.' ") As Justice White wrote in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981), "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed."

This Court most recently rejected formalistic attempts to avert First Amendment analysis in *Simon & Schuster v. New York Crime Victims Board*, ___ U.S. ___, 112 S.Ct. 501 (1991), addressing the same arguments to which the government resorts here. In *Simon & Schuster*, this Court held that even where the state seeks to deprive criminals convicted of *non-speech* offenses of "the fruits of their crime," any such remedy which targets and adversely impacts free expression must survive the most searching scrutiny. Invalidating New York's "Son of Sam" law, which required that any publisher or other "entity" pay over to the Crime Victims Board any funds it owed a person "accused or convicted of a crime" under a contract to produce a book or other work describing the crime, this Court dismissed arguments that First Amendment scrutiny should not apply.

The state maintained that the discriminatory burden on certain speech did not trigger First Amendment scrutiny because the legislature did not *intend* to suppress speech about crime, much as the government has argued RICO forfeitures for obscenity are constitutionally immune because they allegedly are not intended to censor. The Court dismissed this contention as

> "incorrect; our cases have consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.' . . . As we concluded in *Minneapolis Star*, '[w]e have long recognized that *even regulations aimed at proper*

governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.' "
112 S.Ct. at 509. (Emphasis added.)

That the Court of Appeals erred in refusing to apply heightened First Amendment scrutiny is also demonstrated by this Court's opinion in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). In *Arcara*, this Court upheld the one-year closure of a bookstore due to repeated lewd conduct and prostitution on the premises. Although this Court concluded that First Amendment scrutiny was not required in analyzing the non-speech-predicated closure sanction, both the majority opinion and Justice O'Connor's concurrence emphasized that where, as here, a media business is to be permanently closed *for prior speech violations*, such a sanction *must* be analyzed under heightened First Amendment standards. The majority noted that a "criminal [or] civil sanction" *does* require First Amendment scrutiny "where it was conduct with a significant expressive element that drew the legal remedy in the first place, . . . or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity." 478 U.S. at 706-707. As applied in obscenity cases, of course, RICO forfeitures *both* are triggered by expressive conduct *and* inevitably single out those engaged in expression.

Moreover, Justice O'Connor's concurrence in *Arcara* additionally emphasized that "[i]f . . . a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books . . . , the cases would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Id.* at 708. Clearly, every justice in *Arcara* agreed that full First Amendment standards of review are required when the predicate crime which triggers a closure order is obscenity.[15]

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[15] As the Ninth Circuit observed in *Adult Video Association v. Barr*, 960 F.2d 781, 792 (9th Cir. 1992), First Amendment standards of review come into play in reviewing RICO forfeitures based on obscenity, because

For all these reasons, the Court of Appeals unquestionably erred in concluding that First Amendment scrutiny is not applicable where the government has destroyed huge quantities of presumptively protected expression and has closed down and forfeited an entire network of media businesses, solely because seven of their thousands of media items were ultimately found obscene.

B. The Forfeiture And Closure of an Entire Media Business, Exclusively For Obscenity Violations, Is A Classic Prior Restraint Of The Sort This Court Has Condemned As A Per Se Violation of The First Amendment Ever Since *Near v. Minnesota*.

1. Of the various types of prior restraint condemned by this Court, the *Near* type is the most unequivocal First Amendment violation.

This Court has stricken a variety of governmental actions and laws as invalid prior restraints. One of the clearest examples of prior restraint is a law requiring a license as a prerequisite to engage in all future presumptively protected speech activities. These laws are prior restraints,[16] but will be

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of "concern for protecting the public's right to receive, as well as the defendant's right to engage in, non-obscene speech."

> "The forfeiture of assets derived from drugs, arson, fraud and murder rarely, if ever, implicates a public right of access to information. The forfeiture of assets loosely affiliated with obscenity offenses, by contrast, hurts not just the defendant, but also those members of the public who wish to obtain sexually explicit and erotic videotapes. Government 'is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech.' " *Id.*, quoting *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961).

[16] *See, e.g., Forsyth County v. Nationalist Movement*, ___ U.S. ___, 112 S.Ct. 2395, at 2401 (1992), and cases there cited.

upheld if, facially, they allow no substantive discretion to the licensor, and state sufficiently brief and specific time limits within which the decision maker must grant or deny the license. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-229, (1990).

Another type of prior restraint is the "item-specific" prior restraint where government seeks to suppress the publication or exhibition of a *particular* expressive work. For example, in *New York Times v. United States*, 403 U.S. 713 (1971), the government sought to enjoin publication of the Pentagon Papers by *The New York Times* and *The Washington Post*. The government argued that publication of these papers, containing Vietnam War information, would jeopardize national security. Notwithstanding that argument, this Court adhered to the settled principle that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity" (*id.* at 714) and that "[t]he Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' " *Id.* Without rejecting the notion that such a restraint could ever be valid, this Court simply held that the government had not met its extremely heavy burden of justification.

Nonetheless, in other item-specific prior restraint cases, this Court has concluded that the government may overcome its heavy burden and prospectively prevent publication or exhibition of certain *specific items*, but only after they have been proven to be unprotected.[17]

The forfeiture involved in the present case falls into a third category of prior restraint which may be the most

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[17] *See, e.g., Kingsley Books v. Brown*, 354 U.S. 436 (1957), and *Freedman v. Maryland*, 380 U.S. 734 (1965), both of which involved procedures (injunction in *Kingsley*; individual film licensing in *Freedman*) for imposing restraints directly on *specific expression* found to be obscene. (*Compare R.A.V. v. City of St. Paul*, ___ U.S. ___, 112 S.Ct. 2538, 2543 (1992), (obscenity is "speech," but is suppressible speech.)

inimical to the First Amendment. Typified by the prior restraints condemned in *Near v. Minnesota*, 283 U.S. 697 (1931), and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), this type of prior restraint is almost universally found unconstitutional because it imposes a *direct and indiscriminate restraint upon future expression* by a media business and does so exclusively because of past unprotected speech. It is the most unequivocal violation of the First Amendment, for which this Court has never accepted any attempted justification. As this Court summarized *Near* in the subsequent case of *Kingsley Books v. Brown*, 354 U.S. 436 (1957):

> "Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive. In the language of Mr. Chief Justice Hughes, 'this is of the essence of censorship.' 283 U.S. at p. 713. As such, it was unconstitutional." 354 U.S. at 445.

The reason these types of prior restraints are the most clearly unconstitutional is readily demonstrated by comparing them to the item-specific restraint stricken in *New York Times*. In *New York Times* this Court held that government must have an extremely compelling reason for prospectively restraining *even one item* of presumptively protected expression.

In sharp contrast, in the *Near* type of prior restraint, the government does not even *seek* a carefully limited restraint, much less attempt to justify one. Rather, it indiscriminately prohibits future presumptively protected expression simply as retaliation for a prior speech violation. Regardless of whether such a sanction may be characterized as "deserved punishment" for the individual or media business in question, the crucial feature, from a First Amendment standpoint, is that, *by focusing directly on the media materials*, the forfeiture order does not merely punish a wrongdoer, but deprives the public of access to large quantities of presumptively protected expression. Indeed, in the present case, the effect of these

forfeitures has been to eliminate virtually all outlets for erotic materials from the Minneapolis/St. Paul area.

This comparison of the *Near* and *New York Times* types of prior restraints highlights another important aspect of prior restraint doctrine. In prior restraint cases, this Court has always focused on *the speech that is restrained*, not on the speech that triggered the remedy. The latter may sometimes be enjoined or even destroyed, but protected or unspecified speech may not be.

2. Because RICO forfeiture directly and indiscriminately suppresses future presumptively protected speech in retaliation for prior unprotected speech, this Court's decisions uniformly require its invalidation as an unconstitutional prior restraint.

In *Near v. Minnesota*, this Court struck down a prior restraint constitutionally indistinguishable from RICO forfeiture. At issue was a statute which authorized an injunction against future publication in order to abate "malicious, scandalous and defamatory" periodicals as a public nuisance. "Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive," as this Court later characterized the *Near* prior restraint in *Kingsley Books v. Brown*, 354 U.S. at 445.

Because Near had published defamatory matter in nine previous editions of his periodical, *The Saturday Press*, the trial court: (1) ordered the permanent abatement of *The Saturday Press*,[18] necessarily prohibiting all future issues of that magazine whether or not they were defamatory; and (2) permanently enjoined the defendants from ever again publishing *any* scandalous or defamatory newspaper, whether under the title "*The Saturday Press*" or any other. 283 U.S. at 706. This

[18] The trial court also temporarily restrained the defendants from publishing or circulating "any future editions of . . . *The Saturday Press*" pending trial. 283 U.S. at 704-705.

Court squarely held both speech-preclusive remedies unconstitutional: unprotected speech such as defamation could be punished subsequent to its publication, but not by restraining other presumptively protected speech in advance. For government to preclude future speech in response to past unprotected speech, said Chief Justice Hughes, is "the essence of censorship." 283 U.S. at 713.

The forfeiture here is a prior restraint of expression for at least three reasons. First, as to the countless thousands of magazines and videos which the government destroyed, only seven were found obscene. Accordingly, the overwhelming majority were presumptively protected expression which were supressed before they were sold to the public and before any judicial determination that they lacked constitutional protection.

Second, by forfeiting both the ten parcels of real property at which these businesses existed, as well as all of the equipment necessary to operate these businesses (*e.g.*, cash registers, shelves, video projectors, etc.), the government directly prevented these businesses from disseminating and continuing to disseminate any other constitutionally protected materials in the future. Accordingly, the forfeiture of these businesses accomplished an extremely effective prior restraint of the future expressive activity of these businesses, indistinguishable from the prior restraint impact of the abatement order stricken in *Near*.

Third, the forfeited bank accounts and proceeds of the businesses seized under 18 U.S.C. § 1963(a)(2) and (3), also constituted a prior restraint. The statutory term "proceeds," as construed by the government, is extremely broad, representing gross receipts rather than mere profits. The forfeiture of *any* media business' gross revenues over a lengthy period[19] will unquestionably force its closure, necessarily preventing

[19] The four yours of gross revenues forfeited in the present case seems typical, involving forfeiture of all revenues obtained during 1985 through 1988. C.A. 144.

all of the business' future speech activities. Accordingly, forfeiture of proceeds is a prior restraint as well.

As early as *Near*, this Court dismissed the government's present arguments. The Court made clear that a blanket prospective restraint is not "punishment in the ordinary sense, but suppression." *Id.* at 711. "Subsequent punishment for such abuses as may exist is the appropriate remedy, *consistent with constitutional privilege*," i.e. the right to be free from restraints upon protected or unspecified speech. *Id.* at 720.

For all the reasons articulated in the landmark *Near* opinion, both this Court and the state and lower federal courts have consistently enforced as a per se rule the *Near* prohibition against broad prospective restraints upon presumptively protected expression in retaliation for prior speech violations. Because the lower courts have so universally repudiated the particular species of prior restraint rejected in *Near*, cases of this type have rarely reached this Court.

Forty years after *Near*, another case came before this Court involving a broad and direct prospective restraint upon presumptively protected expression. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 417 (1971), a real estate broker obtained an injunction to prevent the Organization For A Better Austin " 'from passing out pamphlets, leaflets or literature of any kind, and from picketing.'" The organization had severely criticized the realtor for "blockbusting" tactics, and he asserted that their picketing and leafletting violated his rights to privacy. In striking the order down as an impermissible prior restraint, this Court emphasized that the doctrine of prior restraint prohibits this type of open-ended order *regardless of whether the predicate speech was protected or unprotected*:

> "It is elementary, of course, that in a case of this kind *the courts do not concern themselves with the truth or validity of the publication*. Under *Near v. Minnesota*, . . . the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. Here, as in that case, the injunction operates . . . to suppress, on the basis of previous

> publications, distribution of literature 'of any kind.'" *Id.* at 418. (Emphasis added.)

As these cases make clear, whether a remedy – be it an injunction, denial of a license, or forfeiture – constitutes a prior restraint does not turn upon the speech which triggered the remedy, but rather upon *what is restrained*. A remedy which indiscriminately precludes future protected or unspecified speech operates as a prior restraint, and the fact that it is triggered by unprotected or illegal speech does not insulate it from First Amendment review.

Reaffirming this principle in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957), this Court upheld a civil injunctive procedure whereby the state could restrain the dissemination of specific books judicially determined to be obscene. The Court expressly distinguished this narrow injunctive remedy from the broad prior restraint condemned in *Near*, noting that the trial judge had "refused to enjoin 'the sale and distribution of later issues' [of the obscene books] on the ground that 'to rule against a volume not offered in evidence would . . . impose an unreasonable prior restraint upon freedom of the press.'" *Id.* at 439. Observing that the state had "studiously withh[eld] restraint upon matters not already published and not yet found to be offensive," the Court reaffirmed that such a restraint would be " 'the essence of censorship.'" *Id.* at 445, quoting *Near*.

Indeed, many opinions of this Court have echoed the concept articulated in *Near* and *Keefe* that the protections of the First Amendment do not disappear where unlawful expression is being punished. As recently as this Court's decision in *R.A.V. v. City of St. Paul*, ___ U.S. ___, 112 S.Ct. 2538 (1992), Justice Scalia, writing for the majority, noted that even when government undertakes to regulate speech within one of the narrow "proscribable categories," such as obscenity, it must do so with due regard for the broader principles of the First Amendment. To say that obscenity and libel constitute categories of speech which may be censored is not to say "that they are categories of speech entirely invisible to the Constitution." 112 S.Ct. at 2543. "Our cases surely do not establish the proposition that the First Amendment imposes no obstacle

whatsoever to regulation of particular instances of proscribable expression, so that government 'may regulate [them] freely.'"[20] *Id.* at 2543.

Similarly, in *Simon & Schuster*, *supra*, this Court struck a law under the First Amendment even though it was challenged by one whose triggering crime was murder, clearly a nonspeech violation. Simply stated, this Court has consistently ruled that First Amendment considerations do not evaporate merely because the triggering conduct may have been unlawful.

Here, the government has violated an even more bedrock principle of First Amendment law than the ban on content-based discriminations invoked in *R.A.V.* and *Simon & Schuster*.[21] In the *Near* prior restraint situation, as discussed above, where government indiscriminately precludes future protected or unspecified speech, the unlimited nature of the remedy is its greatest essential evil. If there is *any* per se rule limiting governmental interference with speech, it is the *Near* rule that past speech abuses may not be redressed by measures which directly and indiscriminately prevent disseminating presumptively protected expression in the future.

This Court has also invalidated laws which impose a greater *burden* on speech-related businesses than on others. *See, e.g., Minneapolis Star & Tribune Co., v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); and *Arkansas Writers Project v. Ragland*, 481 U.S. 221 (1987). The Court, discerning the potential for governmental control of speech through unequal taxation, struck the tax laws in those cases,

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[20] Along the same lines, in *Smith v. California*, 361 U.S. 147, 155 (1959), this Court recognized: "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power."

[21] As this Court stated in *Minneapolis Star*: "Prior restraints . . . clearly strike to the core of the Framers' concerns, leading this Court to treat them as particularly suspect." 460 U.S. at 583, n.6.

in order to prevent injury to important First Amendment rights.

Yet RICO forfeiture inflicts *far* graver injury to First Amendment rights than the discriminatory taxation schemes in *Ragland* and *Minneapolis Star*. The RICO forfeiture remedy operates not just as a *burden* but as a *ban* on future speech. Whereas the unfair taxation of businesses in *Ragland* and *Minneapolis Star* could tend to deter speech, it has nowhere near the absolutely *preclusive* impact of RICO forfeiture.

The controlling principle is that whether a sanction violates the First Amendment must be based upon "the operation and effect of the statute in substance." *Near*, 283 U.S. at 713. Since the operation and effect of the laws stricken in *Minneapolis Star* and *Ragland* was unconstitutional, a fortiori the operation and effect of a complete *ban* on future expression solely because of prior speech violations must also be unconstitutional.

Moreover, this Court need not speculate about the operation and effect of RICO forfeiture. Not only is the effect of this statute apparent from the present facts (*e.g.*, the virtual elimination of erotic media stores in the Twin Cities and the massive destruction of presumptively protected media materials), this total destruction of a media business was both the Justice Department's clearly intended purpose[22] and also consistent with Congress' intent in

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[22] While an illicit motive "is not the *sine qua non* of a violation of the First Amendment," *Minneapolis Star*, 460 U.S. at 592, nonetheless, where the government has clearly pursued these remedies for the improper purpose of destroying both protected sexually oriented expression to which it is overtly hostile as well as unprotected expression, it commits the clearest possible violation of the First Amendment. (*See, e.g.*, Justice O'Connor's concurrence in *Arcara* expressing the view that if government "were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books . . . the case would clearly implicate First Amendment concerns. . . . " 478 U.S. at 708.)

Here, evidence of the executive branch's censorial purpose is abundant. First, in a typical RICO forfeiture, the only seized property which the government will actually *destroy* is that which is contraband. By destroying, rather than selling, this vast inventory of presumptively protected

enacting this forfeiture statute, *i.e.*, to *permanently disable* any media enterprise found to have committed two or more obscenity violations.[23] This disabling statutory purpose has certainly been thoroughly effectuated in the present case.

Because a broad prospective restraint such as RICO forfeiture so universally violates core First Amendment principles, this Court has essentially treated the *Near* type prior restraint as a per se constitutional violation. In neither *Near* nor *Keefe* did this Court hesitate to condemn the prospective restraints outright, nor did any member of the Court even *suggest* that a compelling interest analysis was required.

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expression (and, indeed, by doing so before this Court could even provide appellate review), the government has clearly manifested a censorial desire to remove all sexually oriented materials from public access, regardless of their protected status.

Additionally, in the usual RICO forfeiture, the government sells the forfeited business intact, allowing unrelated third parties to lawfully operate the business in the future. In this case, however, the government chose to dismantle these presumptively protected businesses by separately selling all of the real and personal property necessary to operate them. Indeed, these businesses were far more valuable as going concerns than when "sold for parts." Recently the government quitclaimed one of petitioner's parcels of real estate appraised at $145,000 by the U.S. Marshal for the mere sum of $1. This conduct demonstrates a clearly unconstitutional purpose to prevent the sale of *all* sexually oriented materials, not merely those which are obscene. This is censorship at its worst.

Finally, additional evidence of the government's desire to suppress constitutionally protected materials dealing with sex is found in the collection of cases referenced in note 13, *supra*.

[23] As this Court recognized in *Russello v. United States*, 464 U.S. 16, 26-29 (1983), Congress' purpose in enacting the RICO statute was to destroy a RICO enterprise by making "an attack . . . on their source of economic power itself." (*Id.* at 27.) The forfeiture provision "was intended to serve all the aims of the RICO statute, namely, to 'punish, deter, incapacitate, and . . . *directly to remove the corrupting influence from the channels of commerce.*'" *Id.* at 27-28.

Regardless of whether this Court should adopt Justice Kennedy's suggestion of a per se rule against content-based discriminations[24], this Court has *always* adhered to such a rule when examining prior restraints of the *Near* variety. Because a contrary rule would allow government enormous discretion to stifle disfavored speech and speakers prospectively, this Court has uniformly held that government may not punish unprotected speech by flatly prohibiting future presumptively-protected speech.

This Court's decisions prohibiting mass seizures of erotic materials provide additional support for facially invalidating RICO/obscenity forfeiture. *See Marcus v. Search Warrants*, 367 U.S. 717 (1961); *Quantity of Copies of Books v. State of Kansas*, 378 U.S. 205 (1964); *see also Heller v. New York*, 413 U.S. 483, 491 (1973); *Lo-Ji Sales, Inc. v. New York*,442 U.S. 319, 327-328 (1979); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, at 62-63 (1989), all expressly reaffirming the principles of *Marcus* and *Quantity of Books*.

The Court's common rationale in *Marcus* and *Quantity of Books* was that in the absence of procedures designed to focus searchingly on the obscenity of every item, mass seizures run the risk that some protected materials will be temporarily removed from circulation simply because they are present at the same location where obscene materials are sold. Although these cases involved *pre-judgment* seizures, their First Amendment rationale applies with even greater force to

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[24] *Compare* Justice Kennedy's concurrence in *Simon & Schuster*, 112 S.Ct. at 512-515, where, in the context of the content-based discrimination presented by the Son-of-Sam law, he advocated adoption of a per se rule, rather than the compelling interest analysis applied by the majority. The rationale for such a rule was that to apply even a compelling-interest balancing test "might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so." 112 S.Ct. at 513. To like effect, *see* Justice Kennedy's concurring opinion in *Burson v. Freeman*, ___ U.S. ___, 112 S.Ct. 1846, at 1858 (1992).

invalidate RICO forfeiture premised on obscenity violations. Here, protected materials are *permanently*, not temporarily, removed from circulation, simply because some obscene materials are found at the same location. The forfeiture herein simply cannot be squared with the underlying premise of both *Marcus* and *Quantity of Books*.

Finally, the Court of Appeals erred in adopting the government's assertion that RICO forfeiture is permissible because it is part of a criminal statute and may be characterized as "subsequent punishment" rather than a prior restraint. This distinction clearly misses the constitutional mark.

First, *Near* neither stated nor implied that the First Amendment permits all subsequent punishments for speech violations. Quite to the contrary, *Near* noted that no criminal punishment was involved in that case and then expressly stated: "*We have no occasion to inquire as to the permissible scope of subsequent punishment.*" 283 U.S. at 715 (emphasis added). Obviously, by stating that it had no occasion to inquire as to the *permissible scope* of subsequent punishment, this Court neither endorsed *all* subsequent punishments nor suggested a bright line distinction between "subsequent punishment" and prior restraint. Indeed, by so stating it clearly implied there was some tangible First Amendment limit as to how far subsequent punishment could go.

Second, the mere fact that a sanction is imposed as part of a *criminal* statutory scheme cannot provide the litmus test separating the permissible from the impermissible sanction. If that were the case, it would be permissible, after a criminal conviction and under an appropriately worded criminal statute, to issue the very injunction stricken in *Near*! Similarly, it would be absurd in the present case to suggest that *Near* would have approved as a permissible "*punishment*" a sanction (*i.e.*, forfeiture) whose "operation and effect" was indistinguishable in any meaningful way from the very sanction *Near* invalidated.

The principles which restrict prior restraints and which control this case were clearly articulated in *Near*, *Keefe* and *Kingsley*, *supra*. As the Court emphasized in *Near* and *Kingsley*, whether a statute imposes an impermissible prior restraint or permissible punishment must be measured by its "operation and effect," and cannot be avoided by a facile characterization of the sanction as "punishment."

If the constitutional guarantee could be evaded simply by a legislative determination that the forfeiture of a business is a "punishment" (a classic example of a "talismanic label"), the entire First Amendment prohibition against prior restraints would be meaningless. Under so toothless a test, nothing would prevent the most outrageous control of the press and other media by government. Nearly every media entity has, at one time or another, committed some speech transgression, *e.g.*, defamation, invasion of privacy, obscenity, a "national security" violation, etc. Certainly, media enterprises are constantly called upon to make their best guesses as to whether particular expression falls within the realm of constitutional protections. It is inevitable that nearly every communications business will make an error of judgment at some time or another.

Yet, if government at any level need only label a sanction as a "criminal punishment" in order to forfeit a speech business for one such "wrong guess," the only media entities which will ultimately survive are those which are approved by government.

As noted above, the asserted distinction between "prior restraint" and "subsequent punishment" is neither meaningful nor useful, because it would permit the imposition of the very sanction condemned in *Near* if authorized by a criminal statute. Instead, the appropriate analysis should focus on whether the particular restraint is one which *directly* suppresses presumptively protected expression.

While many types of governmental sanctions will have the effect of *indirectly* restraining expression, *e.g.*, a jail sentence or a fine, the hallmark of a sanction which is a *direct* and impermissible prior restraint is that *it is imposed for a prior speech violation* and *in every case where the statutory*

sanction is imposed, it will immediately or inevitably suppress speech. Petitioner submits that this test articulates the common rationale which both explains this Court's previous decisions involving sanctions challenged as prior restraints and also provides the only constitutionally appropriate method for analyzing the endless variety of sanctions that will inevitably arise in the future.

Under this limiting principle, it is clear that RICO forfeiture for prior speech violations must fall whereas typical jail sentences or fines for obscenity violations remain valid. The unlimited forfeiture required by 18 U.S.C. § 1963(a)(1) and (2) will, in every RICO obscenity application, necessarily or immediately suppress presumptively protected expression. Even if one assumed that every single book and videotape in a forfeited store were obscene, the forfeiture of the real and personal property used in or necessary for dissemination of future presumptively protected expression would still, and in every case, suppress the business' ability to engage in future presumptively protected expression.

In contrast, while imposition of a six month jail sentence for an obscenity violation *might* have the effect of shutting down the expressive business, it would likely not have that effect in most cases. In the present case, for example, had Petitioner's only punishment been his six year jail sentence and his $200,000 fine, his ten businesses would have surely remained open to the public. However, the statutorily mandated forfeiture permanently eliminated the stores. As a result, the public has been deprived of most of the local media outlets for obtaining constitutionally protected erotic materials.

In sum, since RICO forfeiture aims directly at expressive businesses based on prior speech violations and, in every case *directly* compels the suppression of speech itself, and/or the forfeiture of the neutral real and personal property used in or necessary for engaging in presumptively protected speech activities, it must be invalidated as an impermissible prior restraint.

3. In scores of cases invalidating padlock orders, license revocation, and seizure of the equipment and other property of theatres and bookstores as punishment for obscenity violations, the lower federal and state courts have universally concluded that such remedies operate as unconstitutional prior restraints.

Notwithstanding the clarity of the prior restraint doctrine, in the early 1970s, state and local governments, in order to eliminate the "inefficiencies" of individual obscenity prosecutions, adopted various novel and equally unconstitutional precursors to RICO forfeiture. They opted to prevent future obscenity violations by simply shutting down the offending media business; they would "punish" obscenity with a padlocking order or by revoking or denying business licenses. With virtual unanimity, an extraordinary number of state and lower federal courts blocked these attempts to close bookstores and theaters as "nuisances" by padlocking or injunction,[25]

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[25] The following cases have found nuisance laws unconstitutional which provide for the padlocking of businesses where obscenity offenses have occurred in the past: *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 164-166 (5th Cir. en banc 1978) [as to this particular point, all 14 judges of the en banc court were in agreement], *aff'd.* on other grounds, 445 U.S. 308 (1980); *Pollitt v. Connick*, 596 F.Supp. 261, 269-272 (E.D.La. 1984); *People ex rel. Busch v. Projection Room Theater*, 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600 (1976), *cert. den.* 429 U.S. 922 (1976); *General Corp. v. Sweeton*, 320 So.2d 668 (Ala. 1975), cert. den. 425 U.S. 904 (1976); *Kansas v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976); *Gulf States Theaters of Louisiana v. Richardson*, 287 So.2d 480 (La. 1974); *New Riveria Arts Theatre v. Davis*, 219 Tenn. 652, 412 S.W.2d 890 (1967); *Society to Oppose Pornography, Inc. v. Thevis*, 255 So.2d 876 (La.App. 1972); *Giarrusso v. D'Iberville Gallery*, 295 So.2d 891 (La.App. 1974); *State ex rel. Blee v. Mohney Enterprises*, 289 N.E.2d 519 (Ind.App. 1973); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974); *State ex rel. Field v. Hess*, 540 P.2d 1165 (Okla. 1975); *Commonwealth ex rel. Davis v. Van Emberg*, 347 A.2d 712 (Penn. 1975); *City of Minot v. Central Ave. News, Inc.*, 308 N.W.2d 851 (N.D. 1981); *Parish of Jefferson v. Bayou Landing Ltd., Inc.* 350 So.2d 158 (La. 1977), *overruling*

or, alternatively, by revoking their licenses,[26] upon a showing that they sold or exhibited obscenity in the past.

La.App., 341 So.2d 23; *Mitchem v. State ex rel. Schaub*, 250 So.2d 883 (Fla. 1971). *See also Nihiser v. Sendak*, 405 F.Supp. 482, 491-492 (N.D.Ind. 1974), *vacated and remanded on other grounds*, 423 U.S. 976 (1975), *order re-entered* August 16, 1976 (unpub.), *aff'd.* 431 U.S. 961 (1977); *Huffman v. Pursue, Ltd.* 420 U.S. 592, 612, n. 23 (1975); *cf. Speight v. Slaton*, 415 U.S. 333 (1974); *State ex rel. Ewing v. "Without a Stitch"*, 307 N.E.2d 911 (Ohio 1974).

[26] In the following cases, courts have held unconstitutional laws which allowed a permit to be revoked or denied because of a prior obscenity violation: *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Entertainment Concepts Inc. III v. Maciejewski*, 631 F.2d 497, 506 (7th Cir. 1980); *Cohen v. City of Daleville, Alabama*, 695 F.Supp. 1168 (M.D.Ala. 1988); *Genusa v. City of Peoria*, 475 F.Supp. 1199, 1207-09 (C.D.Ill. 1979), *aff'd.* 619 F.2d 1203, 1217-1220 (7th Cir. 1980); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777 (D.Utah 1980); *Bayside Enterprises, Inc. v. Carson*, 470 F.Supp. 1140 (M.D.Fla. 1979); *San Juan Liquors v. Consol. City of Jacksonville*, 480 F.Supp. 151 (M.D.Fla. 1979); *Natco Theatres Inc., v. Ratner*, 463 F.Supp. 1124 (S.D.N.Y. 1979); *Yuclan Enterprises Inc. v. Arre*, 488 F.Supp. 820 (D.Hawaii 1980); *Avon 42nd Street Corp. v. Myerson*, 352 F.Supp. 994 (S.D.N.Y. 1972); *Oregon Bookmark Corp. v. Schrunk*, 321 F.Supp. 639 (D.Oregon 1970); *Perrine v. Municipal Court*, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971), cert. den. 404 U.S. 1038 (1972); *Kuhns v. Santa Cruz Co. Bd. of Sup'rs.*, 128 Cal.App.3d 369, 374-375, 181 Cal.Rptr. 1, 3-4 (1982); *City of Seattle v. Bittner*, 81 Wash.2d 747, 505 P.2d 126 (1973); *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W.2d. 370 (Minn. 1975); *City of Delevan v. Thomas*, 31 Ill.App.3d 630, 334 N.E.2d 190 (1975); *Hamar Theatres Inc. v. City of Newark*, 150 N.J.Super. 14, 374 A.2d 502 (1977); *People v. J.W. Productions*, 413 N.Y.S.2d 552 (N.Y.C.Cr.Ct. 1979); *State v. Bauer*, 159 Ariz. 443, 768 P.2d 175 (Ariz.App. 1988); *see also Intern. Soc. for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832-833 (5th Cir. 1979); *Fernandes v. Limmer*, 663 F.2d 619, 629-630, 632 (5th Cir. 1981); *cf. Marks v. City of Newport Ky.*, 344 F.Supp. 675 (E.D.Ky. 1972); *Chulchian v. City of Indianapolis*, 477 F.Supp. 128, 131-132 (S.D.Ind. 1979), *aff'd.*, 633 F.2d 27, 30 (7th Cir. 1980).

The Georgia Supreme Court's opinion in *Sanders v. State*, 231 Ga. 608, 613-614, 203 S.E.2d 153, 157 (1974), typifies the courts' emphatic rejection of these prior restraints:

> "The injunction closing the store and padlocking it as a public nuisance necessarily halted the future sale and distribution of other printed material which may not be obscene, thereby . . . creating an unconstitutional restraint upon appellant.
>
> "[T]he overly broad coverage contemplated by this statute . . . creates a chilling effect upon the exercise of free expression. We cannot throw out the protected to rid ourselves of the unprotected as these laws would require. . . . We must use the deft, the precise and the remedial incision of the surgeon rather than the bludgeoning blow of the butcher to cut away cancerous obscenity. If we do not, the body politic will suffer too mortal a blow from our zeal to have a decent society, free of obscene publications but otherwise full of poetry and prose."[27]

Additionally, in both civil and criminal obscenity cases, the courts have unanimously held that the state may not seize or forfeit personal property (shelves, projectors, etc.) used to disseminate obscene materials.[28] In short, innumerable courts

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[27] This from a court which can hardly be characterized as "soft on obscenity," as, just one year earlier, it had upheld the obscenity conviction of a theater manager for exhibiting the film "Carnal Knowledge" in *State v. Jenkins*, 230 Ga. 726, 199 S.E.2d 183 (1973), unanimously reversed by this Court in *Jenkins v. Georgia*, 418 U.S. 153 (1974).

[28] *See, e.g., United States v. Polak*, 312 F.Supp. 112, 116 (E.D.Pa. 1970) (ordering return of defendant's personal property; court ruled that seizure of such instrumentalities was impermissible not only before trial but even after a final determination of obscenity, citing *Near*); *State of Kansas v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760, 771 (1976) (enjoining enforcement of statute authorizing forfeiture and destruction of movie projectors, theater seats, etc., upon proof of an obscenity violation, on grounds that this was a prior restraint on future presumptively protected expression); *State v. Feld*, 155 Ariz. 88, 745 P.2d 146, 155 (Ariz.App. 1987), *cert. denied*, 485 U.S. 977 (1988) (RICO

have applied the per se rule of *Near* to invalidate prior restraints considerably less drastic than RICO's outright confiscation of the entire media business including all its protected inventory.

Very recently in *United States v. California Publishers Liquidating Corporation*, 778 F.Supp. 1377 (N.D. Tex. 1991), the district court refused to order the RICO-like obscenity forfeitures the government sought under the discretionary forfeiture provisions of 18 U.S.C. § 1467, and sharply rebuked the government for attempting to invoke such patently unconstitutional remedies:

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forfeiture provisions unconstitutional as applied in obscenity case to authorize post-conviction forfeiture of "bookshelves, cash registers, or similar items" used for protected speech activities); *Maguin v. Miller*, 433 F.Supp. 223, 230 (D.Kan. 1977) (enjoining seizure of "property necessary for the operation of theaters," as such seizures would "constitute an impermissible prior restraint"); *Bongiovanni v. Hogan*, 309 F.Supp. 1364, 1366 (S.D.N.Y. 1970) (ordering return of movie projector lenses seized prior to trial); *Interstate Circuit, Inc. v. City of Dallas*, 247 F.Supp. 906, 911 (N.D.Tex. 1965) (enjoining forfeiture of projection equipment, citing *Near*); *G.I. Distributors, Inc. v. Murphy*, 336 F.Supp. 1036, 1038-1039 (S.D.N.Y. 1972) (ordering return of "items required in the conduct of" bookstore, on grounds that seizure "effectively prevented" distribution of other, constitutionally protected materials); *Star Distributors, Ltd. v. Hogan*, 337 F.Supp. 1362, 1364 (S.D.N.Y. 1972) (ordering return of property the seizure of which "worked a complete and total restraint" on publisher's lawful First Amendment activities and "deprived the public of an opportunity to receive its non-obscene publications"); *Porno, Inc. v. Municipal Court*, 33 Cal.App.3d 122, 126, 108 Cal.Rptr. 797, 800 (1973) (ordering return of projectors on prior restraint grounds); *Europo Books, Inc. v. Pomerleau*, 395 A.2d 1195, 1198 (Md. 1979) (enjoining practice of seizing projectors on theory that this was as invalid a prior restraint as "to seize the printing presses because the newspaper contains patently obscene matter"); *see also L.M.E., Inc. v. City of Hollywood*, 605 F.Supp. 185, 189 (S.D.Fla. 1985); *Jodbor Cinema, Ltd. v. Sedita*, 309 F.Supp. 868, 876 (W.D.N.Y. 1970); *Ellwest Streo Theatre, Inc. v. Byrd*, reported *sub nom. Universal Amusement Co., Inc. v. Vance*, 404 F.Supp. 33, 51, 54-57 (S.D.Tex. 1975); *Dexter v. Butler*, 587 F.2d 176 (5th Cir. en banc 1978) (seizure of projectors based on probable obscenity constituted bad faith harassment).

> "Forfeiture under these circumstances of truly de minimis use of the properties for the commission of the [obscenity] offenses simply serves no legitimate end; that is, no end other than destroying legal business enterprises simply because their stock in trade is sexually related materials." 778 F.Supp. at 1389.
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> "[T]he government's requested forfeiture of Great Western's printing facility is subject to close First Amendment analysis and likely would, if granted, constitute an impermissible prior restraint of expression under *Near v. Minnesota* and its progeny." *Id.* at 1394.

In contrast to this avalanche of authority, the very few lower courts which upheld RICO forfeitures or padlockings based on prior obscenity violations did so by concluding that First Amendment analysis does not apply because "obscenity is not protected by the First Amendment." However, for all the reasons the overwhelming majority of lower courts found the principles of *Near* applicable in the obscenity context, they were wrong. The First Amendment simply cannot be avoided by imposing a direct prior restraint as a sanction under a criminal statute and then invoking the talismanic label of "subsequent punishment."

C. The RICO Act's Forfeiture Remedy Also Violates the First Amendment Because It Is Overbroad In Its Censorial Effect Upon Protected Speech.

Just as RICO/obscenity forfeitures facially violate the prior restraint rule of *Near*, they violate virtually every other foundational First Amendment limitation, including the overbreadth doctrine. Both as an overlapping complement and as an alternative to prior restraint analysis, the facial overbreadth doctrine also mandates reversal of the decision below.

This Court has rarely if ever been asked to hold a *sanction* for a speech offense – as opposed to the substantive definition of the speech offense – void for overbreadth. The more common First Amendment overbreadth case involves

legislation which exceeds its permissible scope by criminalizing or otherwise prohibiting constitutionally protected expression. As a doctrinal matter, virtually every overbroad *sanction* which precludes future protected speech has been quickly repudiated on prior restraint grounds, like the injunction in *Near*. The lower courts having so thoroughly repudiated padlocking injunctions and license revocation for obscenity offenses, for example, this Court has never before been confronted with such an egregiously censorial remedy for obscenity as RICO forfeiture.

Until RICO forfeiture became a weapon in the government's aggressive crusade against erotica, the federal government had never dared to punish a speech offense by such drastic and speech-suppressive means as confiscating an entire chain of media businesses and burning its presumptively protected inventory.

This case is therefore somewhat novel, if only because of the extremes to which government has gone. Although RICO/obscenity forfeiture is readily subject to invalidation as a classic prior restraint, it is also overbroad. The forfeiture provisions have been applied, as their mandatory language requires, to confiscate not just contraband obscene materials and proceeds from their sale, but Petitioner's entire chain of bookstores, video stores, and theaters including the hundreds of thousands of media items which comprised their inventory. The government acquires all ownership rights to these materials and related property, so that it can destroy both the materials and the businesses – as indeed the government has done in this case.

As these facts vividly demonstrate, the RICO/obscenity forfeiture provisions provide a textbook example of facial overbreadth. Because the government is authorized to invoke this remedy in response to obscenity violations, in every case, this sanction will be visited upon a defendant engaged in expressive activity, almost

invariably a media entity such as a theater or a bookstore chain.[29] The scope of RICO's mandatory forfeiture is such that it necessarily requires, as in this case and *Pryba*, forfeiture of the entire chain of media businesses. Thus the RICO Act targets expression in the first instance, and then allows the government to confiscate inventories of protected expression along with the necessary means for future expression.

As this Court has enunciated the overbreadth doctrine in its prior cases, RICO's provisions for blanket forfeitures[30] in obscenity cases represent the sort of overbreadth to which this Court referred in *Members of City Council of the City of Los Angeles v. Taxpayers For Vincent*, 466 U.S. 789, 797-798 (1984), noting that such speech-suppressive statutes may be both unconstitutional as applied to the defendant's conduct and also

> "unconstitutional on their face because . . . any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas. In cases of this character a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner."

Likewise in *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 967-968 (1984), the Court observed:

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[29] Depending solely upon the prosecutor's discretion and creativity, the RICO defendants in an obscenity case can easily include as co-conspirators every entity in the chain of production and distribution of the allegedly obscene material, e.g., the studio which produced a film or the printing company which printed a book or magazine. Convictions of such defendants have already occurred in recent prosecutions under the federal obscenity laws. *See United States v. California Publishers Liquidating Corporation*, 778 F.Supp. 1377 (N.D. Tex. 1991) (refusing to forfeit assets of company which printed the boxes for obscene videotapes).

[30] As noted previously, this facial invalidity affects only § 1963(a)(1) and (2) of the RICO Act; § 1963(a)(3) is susceptible of a constitutional construction (which the courts below did not give it), limiting forfeiture to the actual obscene items and the proceeds from their sale.

> "Where, as here, a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack."

Similarly, just last term in *R.A.V. v. City of St. Paul,* 112 S.Ct. at 2542 n. 3, Justice Scalia noted that the petitioner had properly challenged the ordinance as " 'overbroad' in the sense of restricting more speech than the Constitution permits, even in its application to him."

In virtually every imaginable application in the obscenity context, RICO forfeiture clearly "imposes a direct restriction on protected First Amendment activity," a restriction so broad that "any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas."

Perhaps most directly analogous is *NAACP v. Alabama,* 377 U.S. 288 (1964), in which this Court invalidated for overbreadth a sanction unduly restricting the prospective exercise of First Amendment rights, *even though the triggering conduct (involving both speech and non-speech activities) was unprotected.* In that case, Alabama had obtained an injunction against the NAACP, prohibiting it from conducting its activities within the state on various asserted grounds, including the organization's failure to comply with state laws requiring foreign corporations to register, and its allegedly illegal sponsorship of consumer boycotts. 377 U.S. at 303, 307. This Court held that even if the NAACP's activities did violate valid state laws, the injunction permanently "denying its members the right to associate" in the state was unconstitutionally overbroad. *Id.* at 306, 307-308.

> "This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. . . . '[T]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.' *Cantwell v. Connecticut,* 310 U.S. 296, 304. 'Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton v. Tucker,* 364 U.S. 479, 488." *Id.* at 307-308.

More recently, Justice O'Connor's opinion for the Court in *Airport Commissioners of Los Angeles v. Jews for Jesus,* 482 U.S. 569 (1987), reaffirmed that facial invalidation is the appropriate remedy for such substantially overbroad laws. In *Jews for Jesus,* this Court held that a resolution banning all First Amendment activities in the LAX terminal area was facially unconstitutional for overbreadth. The Court unanimously concluded that regardless of whether the airport terminal was a public or a non-public forum, the resolution was overbroad "because no conceivable governmental interest would justify such an absolute prohibition of speech." 482 U.S. at 575.

Likewise, in this case, no further First Amendment analysis is necessary, because no conceivable governmental interest can justify its confiscation of media businesses in retaliation for unprotected speech.[31] Because *every* use of the statute to seize presumptively protected inventory and all the other speech-facilitating property of a communicative business is overbroad, facial invalidation is the required remedy. As the district court observed in *United States v. California Publishers Liquidating Corporation,* 778 F.Supp. at 1394, wholesale forfeiture for obscenity offenses "simply serves no legitimate end."[32]

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[31] To be sure, this rule is but another way of stating the *Near* rule against prior restraints; overbreadth analysis of a sanction for speech violations simply yields the same result.

[32] Although the Ninth Circuit in *Adult Video Association v. Barr,* 960 F.2d 781 (9th Cir. 1992), ostensibly rejected the plaintiffs' claim that RICO/obscenity forfeitures are facially overbroad, 960 F.2d at 787, just such an inchoate theory of overbreadth actually appears to be the basis for

II. THE TOTAL FORFEITURE OF A $25 MILLION BUSINESS, IN ADDITION TO A SIX-YEAR PRISON TERM AND $200,000 IN FINES, VIOLATES THE EIGHTH AMENDMENT AS A GROSSLY DISPROPORTIONATE PUNISHMENT FOR DISTRIBUTING SEVEN OBSCENE ITEMS.

Ferris Alexander has received the most severe economic sanction ever imposed in this country for obscenity offenses. Merely for distributing seven erotic magazines and videotapes he believed at the time to be constitutionally protected, the ailing 73-year-old Petitioner has been sentenced to serve six years in prison – a probable life sentence – and has been fined some $200,000. In addition, the government has also confiscated virtually everything he owns: the business he had built up over a thirty-year period of operating his bookstore, theater, and video store chain. On the basis of a few materials the jury ultimately decided were obscene, the government has utterly destroyed the Petitioner's life and livelihood. Whether analyzed as a "cruel and unusual punishment" or as an "excessive fine,"[33] RICO forfeiture as applied in this case is grossly disproportionate to the offense and therefore violates the Eighth Amendment. Moreover, on its face RICO revives a form of *in personam* forfeiture closely akin to the much-

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the court's holding that "to the extent section 1963 mandates forfeiture of more property than the Constitution will tolerate as punishment for an obscenity offense, the statute is unconstitutional on its face." *Id.* at 790. Unfortunately, RICO prescribes mandatory, total forfeitures upon conviction of two obscenity offenses, and contrary to the Ninth Circuit's suggestion is susceptible of no reasonable saving construction; it is simply unconstitutional on its face.

[33] For Eighth Amendment purposes, as noted below, RICO forfeitures are tantamount to fines, because they entail essentially the same sort of pecuniary punishment for a crime, distinguished only by the non-liquidity of certain assets. This is not to say that the forfeitures and monetary fines are equivalents for purposes of *First* Amendment analysis, because forfeitures unlike fines impose a direct and inevitable restraint upon protected expression.

abused forfeiture of estate which the Framers clearly sought to abolish under the Eighth Amendment.

The Eighth Amendment prohibits outrageous or barbaric forms of punishment, "excessive fines," and punishments that are "cruel and unusual" because they are extremely disproportionate to the particular offense. In *Harmelin v. Michigan*, ___ U.S.___, 111 S.Ct. 2680 (1991), seven members of this Court endorsed the holding of *Solem v. Helm*, 463 U.S. 277, 284 (1983), that the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."[34] This majority of the Court concluded that the Eighth Amendment at least forbids "extreme sentences that are 'grossly disproportionate' to the crime." 111 S.Ct. at 2705. Although a majority in *Harmelin* agreed that reviewing courts should grant the trial court and the legislature substantial deference, "no penalty is *per se* constitutional," as the Court noted in *Solem*, 463 U.S. at 290, citing *Robinson v. California*, 370 U.S. 660 (1962). *See* 111 S.Ct. at 2704-2705 (Kennedy, J., concurring).

If divided in *Harmelin* as to the meaning of "cruel and unusual punishment," the Court was apparently unanimous in the view that an "excessive fines" claim requires proportionality review. Justice Scalia, in his opinion for the Court joined by Chief Justice Rehnquist, concluded that the cruel and unusual punishment clause requires proportionality review only in capital cases, but apparently agreed with the dissenters' observation that the Eighth Amendment prohibits disproportionate fines:

> "There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have

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[34] *See* 111 S.Ct. at 2702-2709 (Kennedy, J., joined by O'Connor and Souter, JJ., concurring in part and concurring in the judgment); 111 S.Ct. at 2709-2719 (White, J., joined by Blackmun and Stevens, JJ., dissenting); 111 S.Ct. at 2719 (Marshall, J., dissenting).

> recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit."

111 S.Ct. at 2693 n. 9. Although this Court "has never considered an application of the Excessive Fines Clause," *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*, 492 U.S. 257, 262 (1989), Justice Scalia indicated in *Harmelin* that penalties such as forfeitures which entail a built-in incentive for governmental abuse[35] are tantamount to fines for Eighth Amendment purposes: "We relied upon precisely the lack of this incentive for abuse in holding that 'punitive damages' were not 'fines' within the meaning of the Eighth Amendment," in *Browning-Ferris*. 111 S.Ct. at 2693 n. 9. Indeed, Justice O'Connor specifically noted in *Browning-Ferris* that "[i]n current usage, the word 'fine' comprehends a forfeiture." 492 U.S. at 297 (concurring and dissenting opinion).

Thus a majority if not the unanimous Court in *Harmelin* would have agreed that the Eighth Amendment entails a guarantee of proportionality in cases involving blanket RICO forfeiture, either as a "cruel and unusual punishment," or as an "excessive fine." This Court need not resort to proportionality analysis, however, to reject RICO's mandatory total

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[35] Blanket forfeitures of the RICO variety certainly offer a tempting means for the government to fill its coffers. After RICO's forfeiture provisions were strengthened in 1984, "forfeiture cases doubled each year and the number of seizures grew by approximately 125 percent per year." The past few years have witnessed an increasing governmental appetite for these funds: "In dollar terms, total forfeitures went from $27.2 million in fiscal year 1985 to over $580 million in fiscal year 1989." *Concerning Oversight of the Asset Forfeiture Program*, July 24, 1990: Before the Senate Committee on Governmental Affairs, 101st Cong., 2d Sess. 71, 72 (statement by Cary H. Copeland, Director, Executive Office for Asset Forfeiture), quoted in Craig W. Palm, *RICO Forfeiture and the Eighth Amendment: When Is Everything Too Much?*, 53 U. Pitt. L. Rev. 1, 4 (1991).

forfeitures as a form of punishment outlawed by the Eighth Amendment on historical grounds.

At its core, the Eighth Amendment forbids punishments that by their very nature the Framers would have disapproved as barbarous or prone to prosecutorial abuse, or that have come to be viewed as such in accord with our society's evolving standards. RICO forfeiture is not only grossly disproportionate in this particular case; it facially contravenes the Eighth Amendment because it revives the *in personam* forfeiture, a particularly objectionable, abuse-prone form of punishment which the Framers particularly sought to abolish.

There is compelling historical and textual evidence that the Framers firmly intended to abolish the forfeiture of estate of which RICO forfeiture is the modern version. Before Magna Carta, conviction of a felony resulted in automatic forfeiture of all property. William W. Taylor III, *The Problem of Proportionality in RICO Forfeitures*, 65 Notre Dame L. Rev. 885, 893 (1990). These "forfeitures of estate" had been eliminated from English common law for any offense other than treason by the time of the Constitutional Convention; the American Framers went further and prohibited forfeiture of estate in the case of treason, under Art. III, sec. 3, clause 2. *Id.* Also, the First Congress by its Act of April 30, 1790 provided "That no conviction or judgment for any of the offenses aforesaid, shall work corruption of blood, or any forfeiture of estate."[36] Since then, *in personam* forfeitures have been so disfavored under American law that until RICO was enacted in 1970, there had been no known federal *in personam* forfeiture proceedings since the Civil War.[37] Thus "the fact that our society long ago rejected forfeiture of a defendant's goods and chattels upon . . . conviction . . . establishes that our society views forfeiture as

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[36] Act of April 30, 1790, ch. 9, § 24, 1 Stat. 112, 117 (1790) (codified at 18 U.S.C. § 3563 (1982)).

[37] *See* James R. Maxeinor, *Bane of American Forfeiture Law – Banished At Last?*, 62 Cornell L. Rev. 768, 787 (1977).

cruel and unusual punishment unless the property is the proceeds of crime or related to crime in some clearly demonstrable way." Taylor, *supra*, at 893.

Quite apart from the historical evidence that this sort of punishment facially violates the Eighth Amendment, the blanket forfeiture of a multi-million dollar business for a few obscenity offenses is grossly disproportionate by any standard. As punishment for an offense historically classified as a misdemeanor in most jurisdictions where it is a crime at all,[38] the mandatory forfeiture order in this case is as inappropriate as the punishment this Court disapproved in *Robinson v. California*, under a statute making addiction to narcotics a criminal offense. The 90-day jail term imposed for this status offense was "cruel and unusual" even though the jail time was

> "not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." 370 U.S. at 667.

In *Solem v. Helm*, 463 U.S. at 292, the Court noted that in assessing the gravity of the offense, the primary criteria are the harm suffered by the victim and the defendant's culpability. This multi-million dollar forfeiture of Petitioner's assets is especially disproportionate when viewed in light of these criteria, given that the offense involves no legal element of injury and requires negligible proof of scienter. Unlike many of the predicate crimes for RICO, obscenity is a minor, *malum prohibitum* offense. Unfortunately, however, RICO

> "does not limit itself to 'serious criminality,' and its penalties do not adjust qualitatively to the moral blameworthiness of the conduct. The number and variety of predicate offenses, which can include *malum prohibitum* as well as *malum in se*, might suggest that the statute should provide some internal way for modulating its sanctions, but the statute provides no such method." Taylor, *supra*, at 887.

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[38] *See* n. 39, *infra*.

First, in terms of the gravity of the offense, this Court has never discerned a compelling governmental interest to justify laws criminalizing obscenity, but has relied on the concept of obscenity as a proscribable (if difficult-to-define) *category* of speech which may be prohibited on the basis of "legitimate" interests. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973). In *Osborne v. Ohio*, 495 U.S. 103, 109-110 (1990), this Court reiterated, as it had concluded in *Stanley v. Georgia*, 394 U.S. 557 (1969), that the governmental interests in regulating adults' access to "obscene" materials are "weak" and "paternalistic." The Court again noted in *Osborne* that "[w]e found a lack of empirical evidence" to support the state's claim in *Stanley* that "exposure to obscene material might lead to deviant sexual behavior or crimes of sexual violence." 495 U.S. at 109 n. 4.

Additionally, both the legal definition of the obscenity offense and its social context render obscenity a victimless and relatively nonserious crime. The offense requires proof of nothing more than offering erotica for sale or rental to consenting adults; this case typifies recent federal obscenity prosecutions in that it involves neither minors nor an unconsenting adult audience. Moreover, the obscenity predicate is unique among the RICO offenses in that it requires virtually no *mens rea*: the scienter element for obscenity approaches a strict liability standard, requiring only knowledge of the material's sexual content rather than knowledge of its unpredictable legal status as obscenity. Even more so than the crime of issuing a worthless check in *Solem v. Helm*, obscenity is thus " 'one of the most passive felonies a person could commit,' " involving " 'neither violence nor threat of violence to any person,' " and " 'viewed by society as among the less serious offenses.' " 463 U.S. at 296, quoted in *Harmelin v. Michigan*, 111 S.Ct. at 2705 (Kennedy, J., concurring).

Underscoring the nonseriousness of the obscenity offense is the fact that the conduct for which Petitioner was convicted

under RICO is not even criminalized in many states.[39] The immense popularity of indistinguishable videotapes and magazines further attests to the American adult populace's substantial acceptance of sexually-explicit fare, and thus the lack of seriousness of the offense.[40]

Even without the additional First Amendment concerns this case raises, the federal courts have expressed serious reservations about the inherent proportionality problems RICO's mandatory total forfeiture provisions create.[41] In

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[39] Five states – Alaska, Maine, New Mexico, South Dakota, and Vermont – do not have obscenity statutes. In addition, the supreme courts of both Oregon and Hawaii have held that criminal obscenity statutes inherently violate those states' constitutional guarantees of free speech or privacy. *See State v. Kam*, 748 P.2d 372 (Hawaii 1988); *State v. Henry*, 302 Or. 510, 732 P.2d 9 (Or. 1987). The issue is also currently pending before the Arizona Court of Appeals, in *State v. Smith*, Case No. 1 CA-CR 89-1514; the trial court in that case having held that the Arizona obscenity statute violated both the free speech and privacy provisions of the Arizona Constitution.

[40] As noted above with regard to the RICO Act's chilling effect, the immense popularity of adult videotapes indicates widespread acceptance of materials which could also be the subject of an obscenity prosecution. The marketing statistics reveal approximately 400 million rentals of adult videos per year. In 1989, video dealers reported that 47% of adult video rentals were to couples or women alone. *See* Marcia Pally, *Sense and Censorship: The Vanity of Bonfires* 67 (Freedom to Read Foundation 1991).

[41] Commentators have discussed the troublesome proportionality problems posed by RICO forfeitures in a wealth of law review literature, generally concluding that the RICO Act should be amended either to limit forfeitures to the actual proceeds of illegality, or to give the trial court discretion as to the scope and amount of the forfeiture. *See* William W. Taylor, *The Problem of Proportionality in RICO Forfeitures*, 65 N.D.L. Rev. 885 (1990); Ian A. J. Pitz, *Letting the Punishment Fit the Crime: Proportional Forfeiture Under Criminal RICO's Source of Influence Provision*, 75 Minn. L. Rev. 1223 (1991); Vernon M. Winters, *Criminal RICO Forfeitures and the Eighth Amendment: "Rough" Justice Is Not Enough*, 14 Hast. Const. L.Q. 451 (1987); Kathleen F. Brickey, *RICO Forfeitures As "Excessive Fines" Or "Cruel and Unusual Punishments,"* 35 Vill. L. Rev. 905 (1990); John L. Roberts, *The Eighth Amendment As Applied To RICO Criminal Forfeiture*, 10 W.N. Eng. L. Rev. 393 (1988); Craig W. Palm, *RICO Forfeiture and the Eighth Amendment: When Is Everything Too Much?*, 53 U. Pitt. L. Rev. 1 (1991).

United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987), Judge Kozinski for a unanimous panel held that where the defendant makes a prima facie showing that a forfeiture may be excessive, the trial court must make an Eighth Amendment proportionality inquiry, considering the total penalty imposed in light of the gravity of the offense.[42] "Since RICO's forfeiture provision is quite literally without limitation," the court emphasized, "it may well exceed constitutional bounds in any particular case." 817 F.2d at 1414. "The court should be reluctant to order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO violations . . . resulting in relatively little illegal gain in proportion to its size and legitimate income." *Id.* at 1415-1416.

Subsequently, in *Adult Video Association v. Barr*, 960 F.2d 781 (9th Cir. 1992), the Ninth Circuit relied in part on *Busher* in resolving this very issue: whether blanket forfeitures may be imposed in obscenity cases. Rejecting blanket forfeitures for RICO/obscenity primarily on First Amendment grounds, the court also cited *Busher* repeatedly for the proposition that total forfeiture would be an inappropriate remedy for obscenity offenses in all but the most exceptional circumstances. 960 F.2d at 790-791.

As the *Adult Video Association* court concluded, punishing this victimless offense as severely as murder for hire is entirely incongruous and at odds with the Eighth Amendment.

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[42] *Busher* has become a cornerstone case applying *Solem v. Helm* proportionality analysis to criminal forfeitures. Three other circuits have adopted or cited with approval this Ninth Circuit rule that forfeitures must be examined for disproportionality under the Eighth Amendment. *See United States v. Harris*, 903 F.2d 770, 777-778 (10th Cir. 1990); *United States v. Vriner*, 921 F.2d 710, 711-712 (7th Cir. 1991); *United States v. Angiulo*, 897 F.2d 1169, 1211-1212 (1st Cir. 1990). *See also United States v. Robinson*, 721 F.Supp. 1541, 1543 (D.R.I. 1989).

In refusing to apply proportionality analysis or otherwise review this unprecedented punishment for obscenity under the Eighth Amendment,[43] the court below has eviscerated that constitutional protection. Ostensibly deferring to the trial court's discretion, the court of appeals ignored the fact that under § 1963(a), the district court *had no* discretion to limit the RICO forfeiture. Its deference to Congress, which added obscenity to the list of RICO predicate offenses in haste and without considering the anomaly and constitutional problems involved, is misplaced.

Ferris Alexander operated his businesses for some thirty years, in the course of which he distributed millions of media materials protected by the First Amendment. He has been abundantly punished by a six-year prison term and $200,000 in fines, for failing to anticipate that a jury would find seven of the thirteen charged items to be illegal rather than constitutionally protected. The total forfeiture of his multi-million dollar business goes far beyond any legitimate need for deterence or societal retribution for this minor offense. It is egregiously disproportionate, facially suspect as an *in personam* forfeiture, and should be rejected as a constitutionally inappropriate remedy.

* * *

The catastophic forfeiture imposed on Petitioner represents perhaps the most egregious governmental suppression of expression in our nation's history. Solely on the basis of seven *speech* violations, the government has utterly destroyed a twenty-five million dollar media business under the talismanic labels of "racketeering" and "subsequent punishment."

If this Court should endorse this unprecedented takeover of a speech business, it will not only signal the immediate end

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[43] The Eighth Circuit in its opinion below followed the erroneous holding in *United States v. Pryba*, 900 F.2d at 757, that "*Solem v. Helm* does not require a proportionality review of any sentence less than life imprisonment without the possibility of parole." *See* Cert. App. 25.

of the erotic entertainment industry, but, more importantly, will confer upon government new-found power and weapons with which to insure that only newspapers, broadcasters and other media businesses approved by any current administration, will be permitted to exist. As stated by Chief Justice Hughes in *Near*, this "is the essence of censorship."

CONCLUSION

The forfeiture judgments entered against Petitioner, except as they specifically relate to the seven items found obscene at trial and identifiable proceeds from the sale of those materials, constitute invalid direct prior restraints, are overbroad and represent cruel and unusual punishment. They and the portions of the RICO statute which made them mandatory should be stricken and the judgment of the Court of Appeals for the Eighth Circuit affirming them should be reversed.

Dated: September 4, 1992

Respectfully submitted,

JOHN H. WESTON*
G. RANDALL GARROU
CATHY E. CROSSON
CLYDE F. DEWITT
WESTON, SARNO, GARROU & DEWITT
433 N. Camden Drive, Suite 900
Beverly Hills, California 90210
(310) 550-7460

Counsel for Petitioner

*Counsel of Record

APPENDIX

18 U.S.C. § 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law–

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any–

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes–

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (*l*) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection ~~(a)~~ for forfeiture under this section–

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that–

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the

requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other

action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United Sates or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to–

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action

to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to–

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds

from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (*l*), no party claiming an interest in property subject to forfeiture under this section may–

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the

same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(*l*)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United State pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and

evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that–

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant–

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).